

SETTLEMENT AGREEMENT AND RELEASE

This SETTLEMENT AGREEMENT AND RELEASE (hereinafter "Agreement") is entered into between the STATE OF CALIFORNIA AIR RESOURCES BOARD (hereinafter "ARB") 1001 I Street, Sacramento, California 95814, and IMPERIAL IRRIGATION DISTRICT (hereinafter "IID"), 333 E. Barioni Blvd., Imperial, CA 92251.

I. RECITALS

- (1) California Health and Safety Code (*H&SC*) Section 44011.6 established the Heavy Duty Vehicle Inspection Program (HDVIP). It authorizes ARB to inspect on-road heavy-duty vehicles for excessive smoke emissions and engine tampering and to issue citations, accordingly. The program also requires the vehicle owner to repair its engines that exceed the prescribed ARB smoke opacity standards, perform post-repair opacity tests, and submit proof of repairs and any assessed penalties under the Regulations of the Heavy-Duty Smoke Inspection Program, Chapter 3.5, Sections 2180-2188, Title 13, California Code of Regulations (CCR).
- (2) *H&SC* Section 43701 provides that ARB shall adopt regulations that require owners or operators of heavy-duty diesel motor vehicles to perform regular inspections of their vehicles for excess smoke emissions.
- (3) Title 13, CCR sections 2190 et seq. were adopted under the authority of *H&SC* section 43701 and, with limited exceptions which are not applicable here, apply to all heavy-duty diesel powered vehicles with gross vehicle weight ratings greater than 6,000 pounds which operate on the streets or highways within the State of California.
- (4) Title 13, CCR sections 2190 et seq. authorize the Periodic Smoke Inspection Program (PSIP) which requires the owners and operators of California based vehicle fleets of two or more heavy duty diesel motor vehicles with gross vehicle weight ratings greater than 6,000 pounds which operate on the streets or highways within the State of California to conduct annual smoke opacity inspections of their vehicles that are four years older than the model year of the vehicle's engine.
- (5) Title 13, CCR section 2192(a) requires inter alia that the owner of the vehicle "[t]est the vehicle for excessive smoke emissions periodically according to the inspection intervals specified in section 2193(a), (b), and (c)", "[m]easure the smoke emissions for each test...", "[r]ecord the smoke test opacity levels and other required test information as specified in section 2194..." and "[k]eep the records specified in section 2194 for two years after the date of inspection."

- (6) H&SC Section 43016 states, "Any person who violates any provision of this part, or any order, rule, or regulation of the state board adopted pursuant to this part, and for which violation there is not provided in this part any other specific civil penalty or fine, shall be subject to a civil penalty of not to exceed five hundred dollars (\$500.00) per vehicle."
- (7) The ARB considers testing, measuring, recording, and recordkeeping to be critical components in reducing excessive smoke emissions from these heavy-duty vehicles.
- (8) ARB contends IID failed to test, measure, record, and maintain records of smoke emissions from its fleet of heavy duty diesel vehicles for the years of 2008 and 2009 in violation of Title 13, CCR Sections 2190 et seq.
- (9) Health and Safety Code, Sections 39674 (a) and (b) authorize civil penalties for the violation of the programs for the regulation of toxic air contaminants not to exceed one thousand dollars (\$1,000.00) or not to exceed ten thousand dollars (\$10,000.00) respectively, for each day in which the violation occurs.
- (10) Title 13, CCR sections 2022 and 2022.1 authorizes the Public Agencies and Utilities (PAU) Regulation, which applies to any municipality or utility that owns, leases, or operates on-road diesel-fueled heavy-duty vehicles with a 1960 model-year or newer medium heavy-duty or heavy heavy-duty engine certified to greater than 0.01 grams per brake horsepower-hour (g/bhp-hr) and has a manufacturer's gross vehicle weight rating greater than 14,000 pounds. Compliance requires BACT installation on each applicable vehicle in its fleet as required by the implementation schedule.
- (11) Under authority of Health and Safety Code, section 39600 and 39601 the CCR, Title 13, section 2022 et seq. requires the PAU fleet owner to use BACT for each applicable vehicle in the active fleet. Records of the compliance plan must be accessible at the terminal. Each applicable diesel PAU fleet vehicle must have affixed to the driver's side doorjamb, or another readily accessible location known to the driver, a legible and durable label with complete and accurate information filled in.
- (12) ARB contends IID failed to install Best Available Control Technology to vehicles in its fleet according to the schedule outlined in Title 13, CCR Sections 2022.1, in violation of the Health and Safety Code, Section 39674.
- (13) California Health and Safety Code (HSC) section 39650 - 39675 mandates

the reduction of the emission of substances that have been determined to be toxic air contaminants (TACs). In 1998, following an exhaustive 10-year scientific assessment process, the Air Resources Board (ARB) identified particulate matter (PM) from diesel-fueled engines as a toxic air contaminant. In-use Off-road diesel vehicles (off-road vehicles) are powered by diesel fueled engines that emit toxic particulate matter. Off-road vehicles are controlled under section 2449 within chapter 9, article 4.8, Title 13 of the California Code of Regulations (CCR).

- (14) CCR, title 13, section 2449(b) states the regulation applies to any person, business, or government agency who owns or operates within California any diesel fueled or alternative diesel fueled off-road compression ignition vehicle engine with maximum power of 25 horsepower (hp) or greater that is used in a two-engine crane or to provide motive power in a workover rig or to provide motive power in any other motor vehicle that (1) cannot be registered and driven safely on-road or was not designed to be driven on-road, and (2) is not an implement of husbandry or recreational off-highway vehicle.
- (15) CCR, title 13, section 2449(g) sets forth the requirements for reporting all vehicles with engines subject to the regulation.
- (16) CCR, title 13, section 2449(f)(1) sets forth the requirements for labeling all vehicles with engines subject to the regulation with an ARB-issued equipment identification number (EIN).
- (17) ARB contends IID failed to register or initially report their In-Use Off-Road applicable vehicles by the implementation deadline, and also failed to label equipment with EIN as required by scheduled deadline.
- (18) IID is willing to enter into this Agreement solely for the purpose of settlement and resolution of this matter with ARB. ARB accepts this Agreement in termination of this matter. Accordingly, the parties agree to resolve this matter completely by means of this Agreement, without the need for formal litigation, and therefore agree as follows:

II. TERMS & RELEASE

In consideration of ARB not filing a legal action against IID, for the violations alleged above, ARB and IID agree as follows:

- (1) Upon execution of this Agreement, IID shall pay a civil penalty of \$45,375.00. Payment shall be made in check form as described below and the payments shall be submitted no later than March 16, 2012:

- \$34,031.25 to the **California Air Pollution Control Fund.**
- \$11,343.75 to the **Peralta Community College District / Palomar College.**

All payments and documents shall be sent to the attention of:

Mr. Sidney Lau, Air Resources Engineer
Air Resources Board, Enforcement Division
9480 Telstar Avenue, Suite 4
El Monte, CA 91731

- (2) IID shall not violate Health and Safety Code Sections 43701 et seq. and 44011.6, et seq., Title 13, CCR, Sections 2180 et seq., 2190 et seq., and 2485 et seq.
- (3) IID shall comply with one or both of the following options to attend the California Council on Diesel Education and Technology (CCDET) class, as described on the ARB webpage at <http://www.arb.ca.gov/enf/hdvp/hdvp.htm>. This class is conducted by various California Community Colleges and instructs attendees on compliance with the PSIP and the HDVIP.
 - (a) IID shall have all staff members, mechanics and technicians responsible for compliance with the PSIP and the HDVIP attend the CCDET class. Proof of CCDET completion shall be provided to ARB within one year of the date of this Agreement and shall be maintained in each applicable employee's file for the term of his or her employment, or as provided by IID rules, regulations, codes, or ordinances, whichever is longer.
 - (b) If IID uses a contractor to perform the annual smoke opacity testing required under the PSIP, IID shall obtain proof that the contractor's staff conducting the smoke opacity tests completed the CCDET course within the past four years. This proof of CCDET completion shall be provided to ARB with PSIP records as required by this Settlement Agreement and shall be maintained with the annual PSIP records.
- (4) IID shall comply with one or both of the following options to attend the CCDET II class (Diesel Exhaust After Treatment and Maintenance), described on the ARB's webpage <http://www.arb.ca.gov/enf/hdvp/ccdet/ccdet.htm>. This class is conducted by various California Community Colleges and instructs attendees on California Compliance emission regulations and the proper care and maintenance of Verified Diesel Emission Control Strategies (VDECS).

- (a) IID shall have all staff members, mechanics and technicians responsible for maintenance of VDECS attend the CCDET II class. Proof of CCDET II completion shall be provided to ARB within one year of the date of this Agreement and shall also be maintained in each applicable employee's file for the term of his or her employment, or as provided by IID, rules, regulations, codes, or ordinance, whichever is longer.
 - (b) In case IID uses a contractor for the maintenance of VDECS, IID shall obtain proof that the contractor's staff maintaining the VDECS completed the CCDET II course within the last four years. This proof of the CCDET II completion shall be provided by IID to the ARB within one year of the date of this settlement and shall also be maintained with VDECS maintenance records.
- (5) IID shall provide copies of all PSIP compliance records for 2012 and 2013 to the ARB by January 31 of the following year. Copies shall be addressed to the attention of Mr. Sidney Lau, ARB, Enforcement Division, 9480 Telstar Avenue, Suite 4, El Monte, CA 91731. The ARB reserves the right to visit any IID fleet location at any time to conduct compliance audits for the HDVIP and PSIP, or any other applicable ARB program.
 - (6) IID shall complete Low NOx Software Upgrades (reflash) on all applicable heavy duty diesel engines operating in California no later than 45 days after an engine requiring reflash to comply with ARB emission standards is identified or included in its fleet, and return proof to Mr. Sidney Lau, at the address above.
 - (7) Each 1974 or newer diesel powered heavy-duty commercial vehicle in IID's fleet shall comply with the emission control label (ECL) requirements set forth in the CCR, Title 13, Section 2183(c), within 45 days of this agreement.
 - (8) IID shall retrofit the appropriate number of PAU vehicles with best available control technology as specified in CCR, Title 13, and Section 2022.1. IID shall keep the records of the installed diesel control strategy and update the compliance plan accordingly. IID shall affix to each PAU vehicle a legible and durable label with complete and accurate information. This label shall be affixed to the driver's side door-jamb, or any other readily accessible location known to the driver. Within 45 days of the execution of this agreement, IID shall submit a compliance plan to ARB and, by **December 31, 2012**, submit proof of compliance to ARB.
 - (9) IID shall comply with all the requirements of the PAU vehicle rule set forth in CCR, Title 13, and Section 2022.1 et seq.

- (10) IID shall report or register all applicable in-use off-road vehicles in ARB's Diesel Off-Road On-Line Reporting System (DOORS) database. Upon receipt of the ARB-issued EIN, IID shall permanently affix or paint the EIN on the vehicle in white with a red background as specified in 2449 (f) (2). Annual reporting is required by CCR Title 13, Section 2449 (g) (2) for the fleet to remain in compliance with the regulation. All in-use off-road vehicles must be in compliance with the regulation within 45 days of the execution of this agreement.
- (11) IID shall comply with the general requirements for the In-Use Off-Road Diesel-Fueled fleets regulation set forth in CCR, Title 13, Section 2449.
- (12) IID shall instruct all employees who operate diesel fueled commercial vehicles to comply with the idling regulations set forth in CCR, Title 13, Section 2485, within 45 days of this Agreement.
- (13) This Agreement shall apply to and be binding upon IID, and its officers, directors, receivers, trustees, employees, successors and assignees, subsidiary and parent corporations and upon ARB and any successor agency that may have responsibility for and jurisdiction over the subject matter of this Agreement.
- (14) This Agreement constitutes the entire agreement and understanding between ARB and IID, concerning the subject matter hereof, and supersedes and replaces all prior negotiations and agreements between ARB and IID, concerning the subject matter hereof.
- (15) No agreement to modify, amend, extend, supersede, terminate, or discharge this Agreement, or any portion thereof, is valid or enforceable unless it is in writing and signed by all parties to this Agreement.
- (16) Severability. Each provision of this Agreement is severable, and in the event that any provision of this Agreement is held to be invalid or unenforceable, the remainder of this Agreement remains in full force and effect.
- (17) This Agreement shall be interpreted and enforced in accordance with the laws of the State of California, without regard to California's choice-of-law rules.
- (18) This Agreement is deemed to have been drafted equally by the Parties; it will not be interpreted for or against either party on the ground that said party drafted it.

- (19) Now, therefore, in consideration of the payment by IID, in the amount of forty five thousand three hundred and seventy five dollars (\$45,375.00), ARB hereby releases IID and its principals, officers, directors, agents, subsidiaries, predecessors, and successors from any and all claims that ARB may have based on the facts and allegations described in recital paragraphs (1) – (17) above. The undersigned represent that they have the authority to enter into this Agreement.
- (20) Senate Bill 1402 (Dutton, Chapter 413, statutes of 2010) requires the ARB to provide information on the basis for the penalties it seeks (see Health and Safety Code section 39619.7). This information, which is provided throughout this settlement agreement, is summarized here.

The manner in which the penalty amount was determined, including a per unit or per vehicle penalty.

Penalties must be set at levels sufficient to discourage violations. The penalties in this matter were determined in consideration of all relevant circumstances, including the eight factors specified in Health and Safety Code sections 42403 and 43024.

PAU Violations

The per vehicle penalty for the PAU violations involved in this case is a maximum of \$1,000 per vehicle per day for strict liability violations or \$10,000 per vehicle per day for negligent or intentional violations. The penalty obtained for the PAU violations involved in this case is \$23,250.00 or \$375.00 per vehicle for 62 vehicles for an unspecified number of days. The penalty was discounted based on the fact that this was a first time violation and the violator made diligent efforts to comply and to cooperate with the investigation.

PSIP Violations

The per vehicle penalty for the PAU violations involved in this case is a maximum of \$1,000 per vehicle per day for strict liability violations or \$10,000 per vehicle per day for negligent or intentional violations. The penalty obtained for the PAU violations involved in this case is \$17,250.00 or \$375.00 per vehicle for 46 vehicles for an unspecified number of days. The penalty was discounted based on the fact that this was a first time violation and the violator made diligent efforts to comply and to cooperate with the investigation.

ORDV (Off-Road Diesel Vehicle) Violations

The per unit penalty for the Off-Road violations involved in this case is a maximum of \$1,000 per vehicle per day for strict liability violations or \$10,000 per vehicle per day for negligent or intentional violations pursuant to H&SC section 39674. The penalty obtained for the Off-Road violations involved in this case is \$4,875.00 for 13 vehicles or \$375.00 per vehicle for an unspecified number of days. The penalty was discounted based on the fact that this was a first time violation and the violator made diligent efforts to comply and to cooperate with the investigation.

The provision of law the penalty is being assessed under and why that provision is most appropriate for that violation.

PAU Violations

The penalty provision being applied for the Fleet Regulation for Public Agencies and Utilities (Title 13, CCR, section 2022 et seq.) violations (including labeling) is Health and Safety Code section 39674 because the PAU rule is a Toxic Air Contaminant Control Measure adopted pursuant to authority contained in Health and Safety Code Sections 39650 - 39675 and because IID failed to use best available control technology on 62 vehicles as required by the Public Agencies and Utilities rule, on vehicles at the IID's terminals located in Imperial during the years of 2007, 2008, 2009, 2010, and 2011 over an unspecified number of days.

PSIP Violations

The penalty provision being applied to the PSIP violations is Health and Safety Code section 43016 because IID failed to test, measure, record, and maintain records of smoke emissions from its fleet of heavy duty diesel vehicles for the years 2008 and 2009 in violation of the PSIP regulation in Title 13, CCR Sections 2190 et seq, for 46 vehicles. Since the PSIP regulation was adopted pursuant to authority granted in Part 5 of Division 26 of the Health and Safety Code and since there is no specific penalty or fine provided for PSIP violations in Part 5, Health and Safety Code section 43016 is the applicable penalty provision.

ORDV Violations

The penalty provision being applied to the In-Use Off-Road Diesel Regulation (Title 13, CCR, section 2449 et seq.) violations (including labeling) is H&SC section 39674 because the In-Use Off-Road Diesel Regulation is a Toxic Air Contaminant Control Measure adopted pursuant to authority contained in H&SC section 39660, et seq. and because IID failed to register and label their 13 In-Use Off-Road vehicles prior to the August 1, 2009 deadline as required by the In-Use Off-Road Diesel Regulation.

Is the penalty being assessed under a provision of law that prohibits the emission of pollution at a specified level, and, if so a quantification of excess emissions, if it is practicable to do so.

The provisions cited above do prohibit emissions above a specified opacity or level of g/hp-hr. However, since the hours of operation of the non-compliant units involved and their individual emission rate are not known, it is not practicable to quantify the excess emissions.

- (21) IID acknowledges that ARB has complied with SB 1402 in prosecuting and settling this case. Specifically, ARB has considered all relevant facts, including those listed at HSC section 43024, has explained the manner in which the penalty amount was calculated, has identified the provision of law under which the penalty is being assessed and has considered and determined that this penalty is being assessed under a provision of law that prohibits the emission of pollutants at a specified level.
- (22) Penalties were determined based on the unique circumstances of this matter, considered together with the need to remove any economic benefit from noncompliance, the goal of deterring future violations and obtaining swift compliance, the consideration of past penalties in similar cases, and the potential costs and risk associated with litigating these particular violations. Penalties in future cases might be smaller or larger on a per unit/vehicle basis.
- (23) The penalty was based on confidential settlement communications between ARB and IID that ARB does not retain in the ordinary course of business either. The penalty is the product of an arms length negotiation between ARB and IID and reflects ARB's assessment of the relative strength of its case against IID, the desire to avoid the uncertainty, burden and expense of litigation, obtain swift compliance with the law and remove any unfair advantage that IID may have secured from its actions.

California Air Resources Board

By: Ellen M. Peter

Name: Ellen M. Peter

Title: Chief Counsel

Date: 3/21/2012

Imperial Irrigation District

By: John Pierre Menvielle

Name: John Pierre Menvielle

Title: President, IID Board of Directors

Date: